

STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 2002-506

September 6, 2002

PUBLIC UTILITIES COMMISSION
Investigation of GIS Certificates
Associated with Qualifying Facility
Agreements

NOTICE OF INVESTIGATION

WELCH, Chairman; NUGENT and DIAMOND, Commissioners

I. SUMMARY

Through this Notice, we initiate an Investigation concerning the rights to GIS certificates associated with ongoing qualifying facility (QF) power purchase agreements (PPAs). The issue we address in this proceeding is whether QFs that have PPAs with utilities that predate the implementation of the NEPOOL GIS must transfer the GIS certificates to the utilities so they can be provided to the purchasers of the QF entitlements. We tentatively conclude that the utilities have the rights to GIS certificates associated with pre-existing QF contracts, but will provide interested persons with the opportunity to comment before making any final determination.

II. BACKGROUND

Over the last several months, NEPOOL has been working to implement a system that would allow for the unbundling of electricity attributes (e.g. fuel source, emission characteristics) from the energy commodity. This system, known as the Generation Information System or GIS, was developed to allow for a more efficient means for electricity suppliers in New England to satisfy certain state laws and regulations, such as portfolio and disclosure requirements. The system is also intended to allow for a more effective means by which regulators could verify compliance with such laws and regulations. The GIS works through the creation of "certificates" that represent the attributes of electricity, which can be traded separately from the energy commodity.

As a result of the development of the GIS, the Commission recently initiated an Inquiry, primarily to consider whether Maine's portfolio requirement (Chapter 311) and disclosure requirement (Chapter 306) rules should be amended to incorporate the use of the tradable certificates created pursuant to the GIS. *Inquiry into Modifications of Portfolio Requirement and Disclosure Rules*, Docket No. 2002-300 (June 4, 2002).

Based on the comments received in the Inquiry, we anticipate proposing amendments to both rules to incorporate the GIS as the means for compliance verification.¹

Among numerous implementation issues raised in the Inquiry was whether QFs that have pre-existing PPAs with utilities should be required to transfer GIS certificates associated with their generation units to those utilities so that they can be provided to the entities that have purchased the QF entitlements pursuant to Chapter 307. Central Maine Power Company, Bangor Hydro-Electric Company and Constellation Power Source commented that the Commission should act to require QFs to transfer the certificates to the utilities who would then provide them to the purchasers of the entitlements. The Independent Power Producers of Maine commented that the issue is a private contractual matter. The Union of Concern Scientists urged that the Commission attempt to resolve the matter as soon as possible.

III. DISCUSSION

Chapter 360 of our rules governs the relationship between utilities and QFs. Section 7(B) of the rule states that the Commission may at any time initiate an investigation of any matter relevant to the provisions of the Chapter. We hereby initiate this Investigation, pursuant to 35-A M.R.S.A. § 1303 and Chapter 360, to consider whether utilities that are purchasing energy from QFs under pre-existing PPAs are entitled to the GIS certificates associated with the QFs generating units.²

We initiate this Investigation because the issue of the rights to the GIS certificates is crucial to our consideration of whether the GIS should be adopted for use in Maine. We would find it extremely difficult to make any final decision on the adoption of the GIS for purposes of our rules in the absence of a resolution of the issue of the rights to certificates associated with QF generation. Additionally, prompt resolution of the matter is necessary to eliminate market uncertainty regarding the status of the certificates. We thus intend to resolve the matter in this proceeding after input from interested persons. To facilitate the process, we present our preliminary views below. These views may change upon review of comments from interested persons.

We tentatively conclude that QF agreements to sell electricity to utilities pursuant to Chapter 360 include both the energy commodity and the attributes. Thus, our view at this time is that utilities that purchase power from QFs pursuant to PPAs that pre-date the GIS are entitled to the GIS certificates associated with the QF generation. Consistent with the basic intent of the Chapter 307 entitlement agreements, utilities would then provide the certificates to the entities that have purchased the QF entitlements. Accordingly, our inclination is to issue a declaratory ruling in this

¹ We are in the process of initiating a Notice of Rulemaking to amend the portfolio requirement rule (Docket No. 2002-494). We will begin the rulemaking process to amend the disclosure rule in the near future.

² Because the GIS is only applicable in the ISO-NE control area, this Investigation does not include QF transactions in northern Maine.

Investigation stating that purchases of QF power under Chapter 360 include purchases of the associated GIS certificates. Before making any final decision in this regard, however, we will provide interested parties the opportunity to comment.³ Interested persons may file comments by September 20, 2002. Reply comments may be filed by September 27, 2002.

At the outset, we note that the GIS does not purport to determine any issues with regard to the rights to GIS certificates. Pursuant to the GIS Operating Rules (Rule 2.6), certificates are initially assigned to generating units, but this is explicitly done “without prejudice” to the entity that has the ownership rights to the certificates. Thus, the initial provision of certificates to the owners of generation units has no bearing on the ultimate issue of certificate ownership.

All QF contracts in Maine derive from the requirements of the federal Public Utility Regulatory Policies Act (PURPA), 16 U.S.C.A. 2601 *et seq.*, and from the State’s Small Power Production Act (SPPA), 35-A M.R.S.A. § 3301 *et seq.* One of the primary purposes of these Acts was to encourage the development of renewable generation resources and efficient generation resources (cogeneration) by requiring utilities to purchase power from entities that satisfied certain qualifications (i.e. QFs). See 35-A M.R.S.A. §§ 3302, 3306.

The Commission promulgated Chapter 360 to implement the requirements of PURPA and SPPA. Chapter 360 contains detailed requirements for a generating unit to be designated a QF and thus obtain the right to sell power to utilities at certain prices. Ch. 360 § 2. Among these qualification requirements are fuel use or efficiency criteria. These are precisely the type of attributes that can now be represented by GIS certificates. It is only by virtue of the existence of these types of attributes that facilities are deemed QFs and utilities become obligated to purchase their power. The attributes are thus part of the essence of QF PPAs. Moreover, generating facilities are required to maintain the requirements for QF status, showing further that the attributes that make an entity a QF are an essential feature of the QF PPAs.

It is certainly true that the unbundling of electricity attributes was not contemplated when Chapter 360 was promulgated and the QF PPAs were signed. However, this does not change the fact that electricity attributes were a fundamental part of the QF transactions. The development and implementation of the GIS did not create the attributes; rather, the system simply allows for the trading of attributes separate from the energy commodity. The QF transactions were, in effect, a bundled sale of energy and attributes that at the time represented a single product. The adoption of a system that allows for unbundling does not transform the essential nature of QF PPAs as a “bundled” transaction into one that includes only the commodity. The restructuring of the electric industry presents an analogy to the situation raised by the creation of GIS certificates. Prior to restructuring, utilities sold electricity as a bundled

³ We specifically seek comment on whether this issue has been addressed in other states.

product. After restructuring, electricity service was unbundled so that generation service and transmission and distribution service could be provided separately as distinct products. The act of unbundling electricity service did not in and of itself create any new product nor relieve utilities of pre-existing obligations to provide both components of electricity.⁴

The argument that the attributes are part of the QF transactions with utilities is further supported by the common understanding of what was being bought and sold during the Chapter 307 entitlement sales. During the Chapter 307 processes, utilities informed potential purchasers of the QF output that the offered power was renewable or efficient cogeneration that would satisfy Maine's portfolio requirement. There could be no question that the power being sold was intended to include the attributes of the QFs in addition to the energy commodity. No QF at the time of the Chapter 307 auctions disputed representations to this effect, which supports the common understanding that when an entity buys QF power its is buying renewable or cogenerated power.

Moreover, the purchasers of the entitlements understood they were obtaining attributes along with the energy and that the entitlements could be used to satisfy Maine's portfolio requirement. Any claim that the utilities do not have the right to the attributes of QF power would appear contrary to the entitlement purchasers legitimate expectations that they were buying power with certain attributes. As a consequence, if the entitlement purchasers do not obtain the certificates associated with the QF power, the Commission would be forced to consider recognizing the entitlements (without the use of certificates) as satisfying the portfolio requirement so as to avoid the inequitable frustration of legitimate expectations. If this occurs, to prevent the double counting of eligible resources, the Commission may not allow QF associated certificates to be used for any purpose in Maine. This would be an extremely unfortunate outcome in that it would negate much of the benefit to be derived from the GIS and jeopardize the use of the GIS in Maine.

The failure to transfer the certificates to the utilities could also, in our current view, unfairly enrich the QFs at the expense of ratepayers and frustrate the reasonable expectations of the Legislature in enacting the portfolio requirement. The QFs have received what turned out to be above-market prices by virtue of their status as either a renewable or cogeneration resource. Any attempt by a QF to sell certificates to entities other than the utility with which it has a PPA would provide extra profit to the QF by lowering the value of the utilities' entitlements. Because the proceeds from the entitlement sales are use to offset stranded costs, a lower value for the entitlements

⁴ In addition to unbundling the components of electricity service, the Maine Restructuring Act also prohibited utilities from providing generation service. In recognition of the utilities' pre-existing obligation to provide bundled service pursuant to long-term discounted retail contracts, the Maine Legislature included a provision in the Act that maintained the benefit and burdens of such contracts by assuring that customers received both components of the recently unbundled product at the previously contracted prices. 35-A M.R.S.A. § 3204(10).

COMMISSIONERS VOTING FOR: Welch
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